Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1999 A.D.

No.

Oliver: Paulson and Sandra: Paulson,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

Oliver: Paulson
c/o 1422 N.E. Loop 410, #A7
San-Antonio: Texas [78209]

Sandra: Paulson
c/o 107 Trailview
Terrell: Texas [75160]

448P

Questions Presented

I. May the United States convey the rights, title and interests in and to petitioners' property without complying with the statutes?

II. May the United States assert sovereign immunity in a 28 U.S.C. section 2410(a)(1) case when no lawful seizure, levy or sale of the property occurred?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ..... ii-viii

TABLE OF AUTHORITIES ..... iv-vi

PARTIES OF INTEREST viii

ARTICLE OF NATIONAL CONSTITUTION 2

OPINIONS BELOW 1, 2

STATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE 2-3

REASONS FOR ALLOWANCE OF THE WRIT 12

I. The decision of the district and appellate courts conflict with the applicable Supreme and other district and circuit court decisions concerning seizing and selling of property by the government contrary to the law 12

II. The decision of the district and appellate courts conflict with the Supreme Court decisions holding that sovereign immunity is not an issue when corporate UNITED STATES is involved in commercial activities 14

CONCLUSION 17

APPENDIX A

Unpublished Memorandum Order of District Court dated Feb. 19, 1998 ..... A1-A6

Unpublished Judgment of District Court dated Feb. 19, 1998 ..... A7

Unpublished Order of District Court entered March 6, 1998 ..... A8

Unpublished Curiam of Appellate Court filed
Dec. 9, 1998 ..... A9-A10

Unpublished Order of Appellate Court denying Petition
For Rehearing, filed March 01, 1999 ..... A11

APPENDIX B

United States v. Nordic Village, Inc., 503 U.S. 30, (1992) B1

APPENDIX C

Opinion of the Attorney General for the State of Texas .. C1-C5

TABLE OF AUTHORITIES

Supreme Court Cases

Antoni v. Greenhow, 107 U.S. 769..... 17

Bank of the United States v. Planters Bank of Georgia,
22 U.S. 904, 6 L Ed 224 17

Parker v. Overmann, 12 (U.S.) How. 139, 143 (1855) 9

Ex Parte Young, 209 U.S. 122 13

Rio Grand Rwy. Co. v. Gomila, 132 U.S. 478. ..... 8, 9

Service v. Dulles, 354 U.S. 363 (1959) 17

Shriver Junior's Lessee v Lynn, 11 L.Ed. 172 13

Thatcher v. Powell, 19 U.S. (6 Wheat) 119, 125 ..... 7, 9, 10, 12

United States v. Burr, 309 U.S. 242 17

United States v. Calif. & O. Land Co., 148 U.S. 31. 9

United States v. Nordic Village, Inc., 503 U.S. 30. .....B1, 17

Vitarelli v. Seaton, 359 U.S. 535 (1959) 17

Appellate Court Cases

Anderson v. U.S., 44 F.3d 795, 796, (9thCir.1995) 11, 14

Aqua Bar and Lounge Inc. v. U.S. Dept. of Treasury, [76-2 USTC para. 9554] 539 F.2d 935 (3rdCir1976) ... 13, 15, 17

Arford v. U.S., 43 F.3d 1480, 75 AFTR.2d 95-333, 1994 WL 703016 (9th Cir. Idaho), 934 F.2d 229, [95-1 USTC P 50,046] 7, 14

Colorado Property Acquisitions, Inc. v. United States, 894 F.2d at 1173 (10th Cir. 1990)..... 11, 14

Engel v. U.S., 836 F.2d 940, (5th Cir. 1988) 13

Estate of Johnson v. U.S., 836 F.2d 940 (5th Cir. 1988).. 5, 9, 13

Goodwin v. U.S., 935 F.2d 1061(9th Cir. 1991) 14

Guthrie v. U.S., 970 F.2d 735 (10th Cir. 1990) 8, 14, 16

James v. U.S., (1992, CA10), 970 F.2d 750, [92-2 USTC para. 9508] 6, 11, 14

Johnson v. Gartlan, (1971 DC VA), 334 F. Supp. 438, revd. on other grounds (CA4 VA) 470 F.2d 1004, cert den 414 U.S. 865. ..... 7, 11, 13

Koehler v. U.S., 153 F.3d 263, (5thCir.1998) 1, 17

Long v. Anderson, 536 F.2d 739, (7th Cir. 1976). 13, 14

Murray v. U.S., 686 F.2d 1320, (8thCir.1982) 14

Pargament v. Fitzgerald, (D.C.N.Y.1967) 272 F.Supp, 553, affd. 391 F.2d 934. 11

Pollock v. U.S., 819 F.2d 144, (6thCir.1987), [87-2 USTC para. 9463]. 13

Popp v. Eberlein, 409 F.2d 309, (7th Cir. 1969), cert. den 396 U.S. 909. 13

Powelson v. U.S., 979 F.2d 141, (9th Cir. 1992). 11, 14

Reece v. Scoggins, 506 F.2d 967, (5th Cir. 1975), [75-1 USTC para. 9202] 7, 13, 16

Robinson v. U.S., 910 F.2d 1157, 1161 (3d Cir.1990). 6

Schmidt v. U.S., 913 F.2d 837, (10th Cir.1990). 6, 14, 16

U.S. v. City of New York, 233 F.2d 307, (2d Cir. 1966) 13

U.S. v. Coson, 286 F.2d 453, 455-56 (9thCir.1961) 6

U.S. v. O'Dell, 160 F.2d 304, (6thCir 1947) 7, 13

Valley Finance Inc. v. U.S., 629 F.2d 162 (6thCir 1947).... 11, 13

Winebrenner v. U.S., 924 F.2d 851, (9th Cir. 1991) 11

District Court Cases

Anderson v. I.R.S., et al.,(DCS.D.OHIO,East.Div.; [93-1USTC para. 50,301], 1992 U.S.Dist. LEXIS 8126 (S.D.Ohio) C2-91-543; 4/19/1992, p. 11, 15, 17

Bartell v. Riddell, 202 F.Supp. 70, (D.C. Cal. 1962), (62-1 USTC, para 9250) 16

Freedom Mission Church v. Green Bay Packaging v. U.S., 816 F.Supp. 513 (E.D.Ark.1993). 16

Howard v. Adle, 538 F.Supp. 504 (1982) 7, 11

Lawrence v. Beaman, 90-2 USTC 50,514 at p. 85,731 (n.5), 1990 WL 157523, at *6 (D.Mass,1990) 16

Little Farms, Inc. v. U.S., 328 F.Supp. 476 (N.D.Ga.1971) 16

Miller v. U.S., 838 F.Supp. 338 (N.D. Ohio 1993) 17

Smith v. Malone, (1988,D.C.Wash.) C88-340-Z) 17

U.S. V Capar, 372 F. Supp 609 17

Claims Court Case

Burgos Fuentes v. U.S., 14 Cl.Ct. 157, 165 (1987)..... 10

Bankruptcy Court Cases

In Re Dunne Trucking Co., 32 B.R. 182, 10 Bankr.Ct.Dec. (CRR) 1291 (Bnkr. N.D.Iowa 1983) 8

In Re Suppliers, Inc., 41 B.R. 520, Bkrtcy (1984 E.D.Ky).. 5, 9

State Court Cases

Malon v. Champ, 655 S.W.2d 600 (Mo.App. 1983)..... 10

Champ v. Malon, 905 S.W.2d 90 (Mo.App.E.D. 1995)..... 6

Articles of the Constitution of the United States of America, ratified 1787, (hereinafter National Constitution)

Article III, section 2 ..... 13, 15, 16

Federal Regulations and Statutes

26 C.F.R. Ch. 1, 301.6335-1(b)(1,2) 7

26 C.F.R. Ch. 1, 301.6339-1 10

26 U.S.C. § 6321 2

26 U.S.C. § 6323 ..... 3, 5

26 U.S.C. § 6331 3

26 U.S.C. § 6335 ..... 3, 4

26 U.S.C. § 6339 4

26 U.S.C. § 6339 6

26 U.S.C. § 6502 ..... 4, 8

28 U.S.C. § 1254 2

28 U.S.C. § 1746(1) 18

28 U.S.C. § 2410(a)(1) 2, 5, 15

28 U.S.C. § 1331 ..... 2, 15

28 U.S.C. § 1340 15

Federal Lien Registration Act, § 14.001 5

United States Supreme Court Rule 29.4 viii

Applicable Texas State Authority

Texas Property Code, Ch. 11, 12, 14 5

Texas Attorney Generals' Opinion 5

PARTIES OF INTEREST

Petitioner's Title 42 claims against government agents are abandoned. The UNITED STATES is the proper party Respondent. In accord with S Ct Rule 29, Petitioners give the Clerk of this Court notice that Petitioners believe I.R.S. agents Lewis Giles, Kathy Gowens, Nancy S. Spotser, Emmet J. Schayot, and Bobby E. Scott have no interest in the outcome of this Petition. Mr. Paul Coggins, U.S. Attorney, c/o Mr. Joseph A. Pitzinger, III, Maxum Energy Tower, 717 N. Harwood, Suite 400, Dallas, Texas 75201, have been noticed by Petitioners via U.S. First Class Mail.

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No.

Oliver: Paulson and Sandra: Paulson,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

Oliver: Paulson and Sandra: Paulson petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On February 19, 1998, the district court granted the UNITED STATES motion to dismiss, and issued its judgment order. On March 5, 1998, plaintiffs' request for rehearing was denied. The case is unreported and appears in Appendix A1 to A7, infra.

On December 9, 1998, the Appeals Court issued its curiam opinion denying Petitioners Appeal Brief citing *Koehler v. United States,* 153 F.3d 263 (5thCir.1998), as the dispositive law on the issue appealed. On March 1, 1999, petitioners' request for rehearing was denied. The case is unreported, and appears in Appendix A8 to A10, infra.

JURISDICTION

District court jurisdiction was invoked under 28 U.S.C. sections 1331 and 2410(a)(1). Appellate court jurisdiction was invoked under 28 U.S.C. section 1291. Jurisdiction of this Court to review this case is invoked under 28 U.S.C. sections 1254(1) and 2106, and the Constitution of the United States of America, Article III, section 2.

CONSTITUTION, NATIONAL AND STATE STATUTES

Article III of the National Constitution declares:

> "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority, ...
>
> ...In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. ..." Section 2.

Title 28 of the United States Code, section 2410, entitled *Actions affecting property on which United States has a lien* declares:

> (a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—
>
> (1) to quiet title to, real or personal property on which the United States has or claims a mortgage or other lien.

Title 26 of the United States Code, section 6321, entitled *Lien For Taxes* declares:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interests, additional amount, addition to tax, or assessable

penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon **all** property and rights to property, whether real or personal, belonging to such person.

Title 26 of the United States Code, section 6323(f), entitled *Validity and Priority Against Certain Persons,* declares:

(f) PLACE FOR FILING NOTICE; FORM. (1) PLACE FOR FILING.—The notice referred to in subsection (a) shall be filed—

(A) UNDER STATE LAWS.—

(i) REAL PROPERTY.—In the case of real property, in one office within the State (or the county, or other governmental subdivision, as designated by the laws of such State, on which the property subject to the lien is situated; and, ...

Title 26 of the United States Code, section 6331(b) entitled, *Levy And Distraint,* declares:

(b) SEIZURE AND SALE OF PROPERTY.—The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend ***only to property possessed*** and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible). (emphasis added).

Title 26 of the United States Code, section 6335(a) entitled, *Sale Of Seized Property,* declares:

(a) NOTICE OF SEIZURE.—As soon as practicable after seizure of property, notice in writing ***shall be*** given by the Secretary [or his delegate] to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be

mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized. (Emphasis added)

Title 26 of the United States Code, section 6335(b), entitled Notice of Sale, declares:

"The Secretary shall as soon as practicable ***after*** the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or, if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof .... (Emphasis added.)

Title 26 of the United States Code section 6502(b) entitled, *Collection after assessment*, declares:

(b) Date When Levy is Considered Made.—The date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335(a) is given.

Title 26 of the United States Code section 6339(b)(2) entitled *Legal Effect Of Certificate Of Sale Of Personal Property And Deed Of Real Property*, declares:

(b) *Deed Of Real Property.*—In the case of the sale of real property pursuant to section 6335 –

(2) *Deed As Conveyance Of Title.*—***If*** the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed ***shall be*** considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at

the time the lien of the United States attached thereto. (Emphasis added.)

Chapter 14.001, of the *Uniform Federal Lien Registration Act* ; adopted under Vernon's Texas Code Annotated (V.T.C.A.) entitled *Property Code*, both declare:

> "*Certification* of notices of liens, certificates, or other notices affecting federal tax liens by the Secretary or his delegate...entitles them to be filed..." (emphasis added.)

STATEMENT OF THE CASE

Petitioners' timely filed suit under 28 U.S.C. 2410(a)(1) challenging procedural irregularities of Internal Revenue Service (hereafter "I.R.S.") Agents who failed to obey the regulations and statutes and created a "cloud" on the rights, title and interests in and to Petitioners property.

Congress has set forth, in exact order, the procedures for the UNITED STATES and IRS to (a) lien, (b) seize, (c) levy, (d) sell property, and (e) issue a quitclaim deed.

Lien

In government Form 21f (Excpt. App. Br. Exh"A" & Rec. Doc.#6), I.R.S. agents admitted filing notices of tax liens on 9-15-89 and 6-20-94 against petitioners property. Said notices ***were not certified***.

26 U.S.C. 6323(f)(1)(A), requires that a notice of Federal Tax Lien, [Form 668(Y)] ***shall be filed*** in accordance with Texas state laws in the real property section of the county recorder. The notice of federal tax lien ***must be certified*** under the Federal Lien Registration Act, section 14.001, et. seq. Texas Property Code, Chapters 11 and 12 (V.T.C.A.), and in accord with the Texas Attorney Generals' Opinion Letter No. 95-091 dated December 29, 1995, to qualify to be filed (App. C). The Fifth Circuit and other U.S. Courts have held the following:

> ...The services [IRS] interest in seized property is its lien on that property..-*In Re. Suppliers, Inc.*, 41 B.R. 520 Bkrtcy (1984 E.D.Ky); *Estate of Johnson v. United States*, 836 F.2d 940 (5thCir. 1988);

When the I.R.S. files a *certified* notice of lien against Petitioner, it clouds the title of the property and waives sovereign immunity.

> "Filing tax liens against Petitioners property, clouds the title and waives sovereign immunity); "...When the taxpayer challenges the procedural regularity of the tax lien and the procedures used to enforce the lien, and not the validity of the tax assessment, sovereign immunity is waived and the district court does have jurisdiction over a quiet title action." *U.S. v. Coson*, 286 F.2d 453, 455-56 (9thCir.1961), *James, supra*, and quoting *Schmidt v. King*, 913 F.2d 837, 839 (10th Cir.1990); *Robinson v. U.S.*, 910 F.2d 1157, 1161 (3d Cir.1990).

> "... the court held that a ***certified*** copy of the I.R.S.'s Record of Seizure and Sale of Real Estate, Form 21f, was properly admitted into evidence in quiet title action involving real property purchased in tax sale from I.R.S.. 26 USC 6340(b), and [is prima facie evidence showing by admissions, that the I.R.S. did or did not comply with the statute. Even if the District Director of I.R.S. changed the quit claim deed to show the recitation (by the scrivener) therein, that the I.R.S. had substantially complied with the statute of 6335(a) and (b), the I.R.S. failed to prove that it had strictly adhered to the statutory requirements for notice of seizure (6335(a)]." *Champ v. Malon*, 905 S.W.2d 90 (Mo.App.E.D. 1995) (Emphasis added).

Since the UNITIED STATES (I.R.S.) did not certify the two aforesaid tax liens against peitioner, the liens were never qualified to be filed under both the Federal Lien Registration Act and the Laws of the State of Texas.

Seizure

The United States (I.R.S.) admitted that they did not personally give petitioners a written notice of seizure.[1] I.R.S. agents made no attempt to leave a written notice of seizure at Petitioners abode. Petititoners ***were never given*** a written notice

---

[1] I.R.S. Form 21f (Excpt.App.Br.Exh. "A" & Rec. Doc.#6), alleges that I.R.S. agents **mailed** a written notice of seizure to Petitioners on 10-27-94, and allegedly seized the property on the same day, as affirmed by the United States Attorney (Appellees Brief R.36).

of seizure under any approved regulatory or statutory method.

Title 26 C.F.R. 301.6335.1(b) (1,2) and 26 U.S.C. section 6335(a) ***requires*** a written notice of seizure be ***given*** to the property owners or ***shall be left*** at the [owners] place of abode or business if the [owner] has such within the IR district where the seizure is made. This Court, the United States Circuit Courts and District Courts have held the following:

> "strict compliance with the statutes is necessary to validate the seizure, levy and sale..." *Thatcher v. Powell,* 19 U.S. (6 Wheat) 119, 125, 5 L.Ed. 221 (1821)

The I.R.S.'s admission that they mailed a written notice of seizure invalidates the levy.

> "... a postal employee is not a delegate of the Secretary under section 7701(11)(B))" *Howard v. Adle,* 538 F.Supp. 504 (1982)

> "...Tax deed declared invalid for failure by IRS to give notice of seizure to landowner." *Johnson v. Gartlan,* 334 F.Supp 438 (E.D. VA 1971)

> "The mailing of the notice of seizure, even if done in a timely fashion and received by Petitioners, satisfies 26 U.S.C. Section 6335(a) ***only if the owners had no dwelling or place of business within the revenue district."*** *Reece v. Scoggins,* 506 F.2d 967, 971 (5th Cir. 1975). (Emphasis added)

Without a lawful seizure there was no levy.

> "the seizure completes the levy process and "triggers" the sale, and that a lawful seizure is necessary to validate the levy and sale..." *Arford v. U.S.,* 934 F.2d 229 (9th Cir.1991) and U.S. v. O'Dell, 160 F.2d 304 (6thCir 1947) See *Thatcher v. Powell, supra.*

Because the I.R.S. admitted that the U.S. did not follow 26 USC § 6335(a) requiring the I.R.S to give petitioners a written notice of seizure, sovereign immunity is waived under 28 USC § 2410.

> "the waiver of sovereign immunity contained in section 2410 gives the federal district court jurisdiction over claims of IRS failure to meet procedural requirements for assessment, levy, and seizures" *Guthrie v. U.S.,* 970 F.2d 735(10th Cir. 1991)),

Levy

As stated herein, the United States did not certify the two aforementioned liens under the Federal Lien Registration Act and Texas Law against Petitioners and did not give Petitioners a written notice of seizure under 6335(a). Title 26 U.S.C. § 6502(b) states that a levy arises on the date the notice of seizure under 6335(a) is given the petitioners. Under 26 U.S.C. § 6331(b), & (e), a levy shall extend ***only to property possessed*** and obligations existing at the time thereof.

The Courts have ruled that a levy is required to possess the property, either actual or constructive, and to effectuate a sale.

> "a levy is not complete unless a notice of seizure is given." *In Re Dunne Trucking Co.*, 32 B.R. 182, 10 Bnkr.Ct.Dec. (CRR) (Bnkr.N.D. Iowa 1983)

> "the levy being an absolute appropriation in law of the property levied upon." *Rio Grande Rwy. Co. v. Gomila,* 132 U.S. 478.

Because the I.R.S. did not certify the tax liens and did not give Petitioners a written notice of seizure, a levy did not arise to appropriate Petitioner's property.

Sale

Form 21f shows that on February 2, 1995, the I.R.S. received $60,511.51 from Bobby H. Anglin and gave Mr. Anglin a certificate of sale (on February 3, 1995) allegedly conveying rights title and interest in and to Petitioner's property. Petitioners were never given a written notice of sale under any approved regulatory or statutory method.

In *Re Dunne Trucking Co.*, supra, the court held:

> "...[a] levy is not considered complete unless a notice of seizure is [given] to the owner or holder of rights to property levied upon. I.R.C. sect. 6502(b) (CCH 1981). ...Notice of seizure appears then to be not only a condition precedent to an effective sale, but also to the completion of the levy proceedings. The court further held that a violation of either failure by the I.R.S. to give a notice of seizure or notice of sale ***nullifies*** the sale of property." (Emphasis added).

Title 26 U.S.C. § 6335(b) imposes a duty on the I.R.S to give Petitioner's a written notice of sale. The courts have held that a written notice of sale is necessary to validate the sale; (See *Thatcher v. Powell,* 19 U.S. (6 Wheat) 119, 125, 5 L.Ed. 221 (1821) as governing this case. In *Parker v. Overmann,* 12 (U.S.) How. 139, 143 (1855), this Court held that a strict and exact compliance with the statutes requirements is a condition precedent to the vesting of any authority in the officer to sell the property. The severe inflictions upon the officer, for his ***neglect*** to comply with the exigencies of the act, indicate clearly the importance attached to his compliance in view of the legislature, and that a ***neglect*** of them would ***vitiate*** any subsequent proceedings. In *United States v. California & O. Land Co.*, 148 U.S. 31, this Court held that

> "...the essential elements which go to make a bona fide purchaser of real estate are: (1) a valuable consideration; (2) an absence of notice of fraud ***or defect;*** (3) presence of good faith.—It is again decided that when a statute of the United States delegates to a tribunal or officer full jurisdiction over a subject in which the United States are interested, his or its determination within the limit of his authority is conclusive, in the absence of fraud [or defect])." (emphasis added).

The court in *In Re Suppliers, Inc.*, 41 B.R. 520 Bkrtcy (1984E.D.Ky), held that,

> "...The Service's interest in seized property is its lien on that property." In 6331(a, b) Seizure and sale of property—The wording of the above statute strongly suggests that "seizure," as well as "sale," is different and distinct from "levy." ... and, to transfer title to the Government a levy must be made by a lawful seizure; ..."The levy being an absolute appropriation in law of the property levied upon." *Rio Grand Rwy. Co. v. Gomila,* 132 U.S. 478, 10 S.Ct. 153, 33 L.ed 400; Estate of *Johnson v. United States,* 836 F.2d 940 (5th Cir. 1988);

From the foregoing, the alleged sale of Petitioner's property by the I.R.S. was nullified by failure to comply with the herein mentioned statutes.

Quitclaim Deed

Approximately six months after the "alleged" sale of Petitioner's

property to Bobby Anglin, the I.R.S. issued a quitclaim deed listing Petitioner's property as sold by the I.R.S. The quitclaim deed did not recite on its face that a superior lien holder, Johnston Seed Company, was given notice of the auction, nor that the Petitioners (lawful joint owners of the property), were given a written notice of seizure and sale, or, that the signature of the notary on the deed was not certified to by the appropriate county clerk.

Title 26 U.S.C. § 6339(b)(2) authorizes the I.R.S. to issue a quitclaim deed ***if*** the I.R.S complies with the requirements of 26 U.S.C. §§ 6335(a) & (b). The word "if" used in 26 U.S.C. § 6339(b)(2) is a conjunctive, restrictive and imposes a duty on the I.R.S. to comply with 26 U.S.C. §§ 6335(a) & (b) before the quitclaim deed may convey any right title and interest in Petitioners property. (See 26 C.F.R. Ch. 1, 301.6339-1).

This Court and the U.S. courts have consistently held that a quitclaim deed is not a warranty and conveys only rights, title and interest in and to the property lawfully acquired by the ***conveyor***.

> "... the director's deed (quitclaim deed) is invalid if the I.R.S. fails to give a personal written notice of seizure or written notice of sale to the owner of the property. The deed is only prima facie evidence of the facts stated therein and NOT OF THE VALIDITY OF THE SALE. [26 USC 6339(b)]" *Malon v. Champ,* 655 S.W.2d 600 (Mo.App. 1983); See *Thatcher v. Powell, supra.*

> "...the quitclaim deed must show on its face: (1) that the legally required auction notices had been published; (2) that the deed did not evidence that the wife of the taxpayer received notice of the sale of the property; (3) that the authority of the government officials who sold the property and executed the deed was not verified in the deed; (4) that there was no evidence on the face of the deed that the other creditors with rights in the property received notice of the auction; and (5) that the signature of the notary on the deed was not certified to by the appropriate county clerk." *Burgos Fuentes v. U.S.*, 14 Cl. Ct. 157, 165 (1987),

The district court's dismissal of Petitioners' case and confirmed by the court of appeals, was based on the ground that the district court did not have subject-matter jurisdiction and the government had not waived sovereign immunity because the I.R.S. asserted it sold the property before commencement of suit, and had no further interest or lien in Petitioners' property rights, title and

interests.

Even assuming that the court could reach the claim and defense of I.R.S. in this case, governments' argument has been rejected by the courts as being without merit. See *Anderson v. I.R.S., et al.*, (DC S.D.OHIO, East.Div.), No. C2-91-543; 4/19/1992; and *James v. United States,* (10th Cir.1992) 970 F.2d 750 (supra). Notice of sale, is distinguished from notice of seizure and from notice of redemption—*Johnson v. Gartlan* (1971), DC VA) 334 F.Supp. 438, revd. on other grounds (CA4 VA) 470 F.2d 1004, cert den 414 U.S. 865, (...and the court held that notice of sale will not suffice as a notice of seizure, and the court concluded that section 6335 notice requirements abandoned all earlier efforts to distinguish between real and personal property to be sold. See Senate committee note appended to 26 U.S.C.S. section 6335. Tax sale and tax deed declared invalid for failure by IRS to give notice of seizure to landowner). See *Powelson v. United States,* 979 F.2d 141 (9th Cir. 1992) (where the I.R.S. failed to comply with statutory notice of seizure requirement or to exercise due diligence). *Winebrenner v. United States,* 924 F.2d 851 (9th Cir. 1991) (A notice of seizure shall be given to the owner of the property). See *Valley Finance Inc. v. United States,* (1980) 629 F.2d 162, 203 U.S.App DC 128, cert. den. 101 S.Ct 3007, 451 U.S. 1018, 69 L.Ed.2d 389. (Corporation which owned property levied upon by the I.R.S. was entitled to notice of the seizure.) See *Pargament v. Fitzgerald,* (D.C.N.Y. 1967) 272 F.Supp, 553, affd. 391 F.2d 934.

The *Johnson v. Gartlan, supra,* suit was commenced over a year after the deed issued and that in the *Howard v. Adle,* 538 F.Supp. 504 (E.D.Mich. 1982); case, the suit was filed about a month after the deed issued.

The Court in *Anderson v. U.S.* 44 F.3d 795 95-1 USTC (CCH) P 50,048, Calif. 1995), stated: A stickler for enforcing the statutory notice it is entitled to receive, (citing *Colorado Property Acquisitions, Inc. v. United States*, 894 F.2d at 1173 (10th Cir. 1990)), the Government should be no less punctilious with respect to the statutory notice it is required to give.

Petitioners adopt by reference as though set forth fully at length herein at the district court record under #3-97-CV-1452, and Appellate record under #98-10407.

Under the aforementioned case law, the admitted neglect of the I.R.S. agents to give a written notice of seizure to both Petitioner owners ***prior to the alleged sale*** as mandated by the law, was dispositive of the case on the merits in favor of Petitioners as a matter of law.

Aforementioned acts of the U.S./I.R.S. agents and the statutes

governing lien, seizure, levy, sale and deed of property, show that the I.R.S illegally deprived Petitioners of the their property and conveyed ***no*** rights, title or interest in and to Petitioners property by the aforementioned quitclaim deed to Bobby H. Anglin.

The aforementioned lien interest that the I.R.S/U.S. published in the county recorders officer listing and affecting Petitioner's rights title and interest in and to Petitioner's property is clouding title of Petitioner's property to this very day.

I.

May the United States convey the rights, title and interests in and to petitioners' property without complying with the statutes?

The decision of the district and appellate courts conflict with applicable Supreme and other district, circuit, bankruptcy and even State court decisions concerning seizing and selling of property by the government contrary to the law.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

This petition should be granted by this Court because the rulings of the lower District and Appellate Courts in this case conflict with established rulings of this Court in *Thatcher v. Powell*, 19 U.S. (6 Wheat) 119, 125, 5 L.Ed 221 (1821). In *Thatcher, supra,* Chief Justice Marshall stated that

> "no individual or public officer can sell, and *convey good title to*, the land of another, unless authorized so to do by express law, is one of those self-evidence propositions to which the mind assents, without hesitation; and that the person invested with such power must pursue with precision the course prescribed by law, or his act is invalid, is a principle which has been repeatedly recognized in this court." (emphasis added).

Thatcher, supra established that a government officer can not sell and convey good title to Petitioners land except under the strictures of the law and controls this case. *Thatcher, supra* is quoted in at least a dozen quiet title cases in the district and appellate courts.

"To make a tax deed effective to convey a title, the sale and matters preliminary thereto must be had in accordance with the statute, and each step required to be performed must be taken. If any one essential act has been omitted or improperly performed, the sale will be held non-effectual and insufficient to convey title to the purchaser." *Long v. Anderson,* 536 F.2d. 739 (7th Cir. 1976). See I*n Shriver Junior's Lessee v Lynn,* 43 US 43, 11 L. Ed. 172 (The court held that the sale being without authority, the ratification of it by the court must be considered as having been given inadvertently.)

This Court in *Ex Parte Young,* 209 U.S. 122 (1907), stated that "the court will not take jurisdiction if it should not, it must take jurisdiction if it should. It cannot avoid meeting a measure because it desires so to do."

Article III, section 2 of the National Constitution and the aforementioned statutes governing lien, seizure, levy, and sale of Petitioner's property require that the district court take subject-matter jurisdiction over the seizure-levy process in this case.

The district and appellate courts' decisions in this case, in respect to the lien-seizure-levy-[sale], conflict[1] with decisions of

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[1] The second circuit in *United States v. City of New York,* 233 F.2d 307 (2d Cir. 1956) (federal statutory provision as to interest conveyed at tax sale takes precedence over erroneous recitation of same in deed); *Valley Finance Inc. v. United States,* 629 F.2d 162 (2nd Cir.DC 1980) (regarding giving notice of seizure); the third circuit in *Aqua Bar and Lounge Inc. v. U.S. Dept. of Treasury,* 539 F.2d 935 (3rd Cir. 1976) (alleged improper procedures regarding lien interests of government after sale); the fourth circuit in *Johnson v. Gartlan,* (4th Cir. 1971) 470 F.2d 1104 (distinguished between notice of sale from notice of seizure, and that notice of sale will not suffice as a notice of seizure, that failure to give the owner a written notice of seizure and sale was sufficient to invalidate the tax sale and deed, suit commenced after sale, however the sale was validated by taxpayer's accepting & cashing the I.R.S. check for the proceeds of the sale), the fifth circuit in *Engel v. United States,* 836 F.2d 940, (5th Cir. 1988)(taxpayer may contest the procedural validity of tax liens); *Reece v. Scoggins,* (1975, CA5Ga) 506 F.2d 967, 26 ALR Fed. 374 (failure of I.R.S. to give taxpayer adequate notice of intended sale, notice requirements designed to protect taxpayer); *Estate of Johnson v. United States,* 836 F.2d 940 (5th Cir. 1988) (I.R.S. property interests is in its lien); the sixth circuit in *Pollack v. United States,* 819 F.2d 144 (6th Cir. 1987) (a suit under 28 U.S.C. 2410 is proper to contest the procedural regularity of a lien [and all facets]; *U.S. v. O'Dell,* 160 F.2d 304 (6thCir 1947) (the levy is an absolute appropriation in law of the property); the seventh circuit in *Popp v. Eberlein,* 409 F.2d 309 (7th Cir.1969) (jurisdiction remains even after government has already seized and sold subject property to a third party); *Long v. Anderson,*

the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth circuit courts regarding similar fact issues and subject matter.

Allowing the lower district and appellate Court's judgments to stand in this case creates confusion and ambiguity in the law and principles established by this Court and upheld by the other circuits mentioned herein regarding the duties imposed on the United States under Title 26.

II.

May the United States assert sovereign immunity in a 28 U.S.C. section 2410(a)(1) case when no lawful seizure or sale of the property occurred?

The decision of the district and appellate courts conflict with Supreme Court decisions holding that sovereign immunity is not an issue when corporate UNITED STATES is involved in commercial activities.

Petitioner's case filed in the District Court established the jurisdiction of the lower court under Article III, and 28 USC §§ 1331, 2410(a)(1).

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536 F.2d. 739 (7th Cir. 1976) (If any one essential act has been omitted or improperly performed, the sale will be held non-effectual and insufficient to confey title to the purchaser); the eighth circuit in *Murray v. U.S.*, 686 F.2d 1320, 1321 (8thCir.1982) (the ***right of redemption*** arises ***only*** in connection with tax levy and is integral facet of such); the ninth circuit in *Powelson v. United States*, 979 F.2d 141 (9th Cir. 1992) (I.R.S. failed to comply with seizure requirements); in *Anderson v. U.S.*, 44 F.3d 795, 796 (9th Cir. 1995) (stickler for enforcing statutes); *Arford v. U.S.*, 43 F.3d 1480 (9th Cir. (Idaho) 1994) and 934 F.2d 229 (a levy is reguired to trigger sale); *Goodwin v. United States*, 935 F.2d 1061 (9th Cir. 1991) (I.R.S. must strictly comply with the notice requirements); and, the tenth circuit in *Colorado Property Acquisitions, Inc. v. United States*, 894 F.2d at 1173 (10th Cir. 1990) (stickler for enforcing statutes); *Guthrie v. United States*, 970 F.2d 735 (10th Cir.1990) (consent to suit is available to taxpayers challenging procedural irregularities in the establishment of a lien); *Schmidt v. U.S.*, 913 F.2d 837, 839 (10th Cir.1990) (no distinction if notice violation regards a seizure or sell of property); *James v. United States*, (1992, CA 10) 970 F.2d 750 (in regards to I.R.S. claims that it had no interest or lien upon taxpayers title / interests to his unpaid or unearned wages at time of suit is rejected).

Sovereign Immunity Waived Under 28 USC § 2410(a)

Title 28 U.S.C. Section 2410 declares:

> "... the United States may be named a party in any civil action or suit in any district court, or in any State Court having jurisdiction of the subject matter- (1) to quiet title to, ... real or personal property on which the United states has or claims a mortgage or other lien."

In *Anderson v. I.R.S., et al.,* (DC S.D.OHIO, East.Div.; [93-1 USTC para. 50,301], 1992 U.S.Dist. LEXIS 8126 (S.D.Ohio) No. C2-91-543; 4/19/1992, p. 84,186, 84,187-84,188, (See Rec. Appellants Motion for Reh. Pg's. 3 to 6), the court held:

> "The district court had jurisdiction over a taxpayer's suit challenging the IRS's tax collection procedures. The IRS waived its sovereign immunity when it levied, seized and sold the taxpayer's property. The IRS's argument that it did not have a claim or interest in the property after the sale was without merit. Back reference: para. 42,205.102 ... the IRS argues that 28 U.S.C. section 2410 does not apply because after it seized the property, it sold it at public auction. Therefore, at the time of the filing of the complaint, it no longer had a claim or interest in the property. ***The Court finds this argument without merit.***" (emphasis added).

> "The IRS has waived its sovereign immunity with respect to the levy, seizure, and sale of the Bevelheimer property. The IRS fixed a tax lien on the Bevelheimer property to bring the title into question. It then sold the property at public auction receiving compensation which satisfied the lien. In a similar case, the district court held that it had jurisdiction under 26 U.S.C. section 2410 to decide a notice question after the government sold the plaintiff's property to satisfy past due taxes. There[fore], action by the government waived its immunity." *Aqua Bar & Lounge v. United States Department of Treasury,* [77-2 USTC P.9552], 438 F.Supp. 655, 656 (E.D.Pa. 1977) [539 F.2d 935 (3d Cir. 1976)]. Therefore, this District Court has proper subject-matter jurisdiction, pursuant to 28 U.S.C. section 1340 and section 2410."

The facts of Andersons' case are distinguished from

Petitioners' case in that Anderson (supra) challenged the validity of the collection activities of the IRS. Anderson brought suit after his property was sold. As shown the Court herein, the alleged "sale" petitioner's property was nullified.

In *Freedom Mission Church v. Green Bay Packaging v. United States*, 816 F.Supp. 513 (E.D.Ark.1993), the court held, "... that jurisdiction under 28 USC section 2410, remains even after, as here, the government has already seized and sold the subject property to a third party." See *Little Farms, Inc. v. United States*, 328 F.Supp. 476 (N.D.Ga.1971),[71-2 USTC para. 9644]. In the case of *Bartell v. Riddell*, (1962, D.C.Cal) 202 F.Supp. 70, the court stated that the notice requirements of 26 U.S.C. section 6335 were intended to protect a taxpayer. See *Reece v. Scoggins*, (1975, CA5 Ga.) 506 F.2d 967, 26 ALR Fed. 374.

Similarly, the Massachusettes district court has ruled that "section 2410 deals with law suits in which the United States either claims a mortgage or lien in the property, or in which the plaintiff challenges the validity of the tax auction sale." --- *Lawrence v. Beaman*, 90-2 USTC 50,514 at p. 85,731 (n.5), 1990 WL 157523, at *6 (D.Mass,1990). The district courts in the tenth circuit make no distinction as to whether the I.R.S. agents conduct violates the notice of seizure or notice of sale. See *Schmidt v. U.S., supra*, and *Guthrie v. U.S.*, 970 F.2d 735 (10th Cir. 1991).

Sovereign Immunity is Waived when the United States Engages in Commerce

This Court has held that when corporate UNITED STATES engages in a commercial activity, (i.e., by seizing and selling property), sovereign immunity is not an issue. When the I.R.S. agents file certified notices of federal tax liens and commenced a seizure-levy-sale process the United States is engaging in commercial activity and sovereign immunity is not an issue.

The following cases uphold that sovereign immunity of corporate United States was never an issue in this case.

> "When governments enter the world of commerce, it is subject to the same burdens as any private firm." *United States v. Planters Bank, 9 Wheaton* 904, 906. See also; *United States v. Burr*, 309 U.S. 242.
>
> "When government enters the markets of the world by becoming a borrower, the sovereignty of that government is laid aside and the government takes a position of ... and individual, and is bound in accordance thereof." *Antoni v.*

Greenhow, 107 U.S. 769

The Appellate Court adopted *Koehler v. United States,* 153 F.3d 263 (5thCir.1998) against Petitioners. In *Koehler, supra,* the I.R.S. neglected to give Koehler a written notice of sale, whereas I.R.S. neglected to give Petitioners a written notice of seizure or [sale] by any approved method. *Koehler, supra* is in direct conflict with rulings of this Court upholding the right to sue the United States when engaged in commerce (lien, seizure, levy, sale, etc) and in conflict with rulings of the 3rd circuit court in *Aqua Bar & Lounge, supra* and the district court in *Anderson v. I.R.S., supra.*

The court in *United States v. Nordic Village, Inc.* 503 U.S. 30, (1992), refers to sovereign immunity as being "judge made law", and suggests that sovereign immunity should be banned. The specific words of the statute do not "unequivocally express" any textual sovereign immunity waiver, and no specific statute was identified by the government or the courts that did (App. B1).

The Courts have held that government waives sovereign immunity: when a government agent admits to violating a regulation or statute, (See *Smith v. Malone,* (1988,D.C.Wash.) C88-340-Z); *Miller v. U.S.,* 838 F.Supp. 338 (N.D. Ohio 1993); *U.S. v. Capar,* 372 F.Supp 609; *Vitarelli v. Seaton,* 359 U.S. 535 (1959); *Service v. Dulles,* 354 U.S. 363 (1959).

The United States Claims a Lien Interest in Petitioner's Property

As shown this Court herein, the United States asserts as public record in the county recorders office, right, title and lien interest in all of Petitioner's property to this day. The decision of the lower courts in this case conflict with the Petitioner's right to obtain redress under Article III and 28 U.S.C. 2410.

CONCLUSION

The facts in this case urge the Supreme court to exercise its power of supervision and resolve this confusion of law that exists within the different circuits. Granting instant writ would clarify the law to the lower courts regarding I.R.S. agents strict compliance with the notice requirement regulations and statutes *before* the government can claim that it has no interest or lien in the property sold; and, that corporate UNITED STATES has no sovereign immunity if the facts of the case reveal that government

engages in commerce, and or, *arguendo,* in the alternative, that full compliance with the regulations and statutes by I.R.S. agents is necessary to enable the UNITED STATES to waive sovereign immunity in a "quiet title" case, irregardless of whether the sale was made before or after commencement of suit if a statute is violated prior to sale.

To allow the district court decision to stand erodes the law, is not the intent of Congress, and is against Public Policy as set forth in the National Constitution. For the above reasons, ***the writ of certiorari should issue.***

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 26 of May, 1999 A.D.

Oliver: Paulson;
natural Texas State Citizen
c/o 1422 N.E. Loop 410, #A7
San-Antonio: Texas [78209]

Sandra: Paulson:
natural Texas State Citizen
c/o 107 Trailview
Terrell: Texas [75160]

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLIVER NEAL PAULSON, ET AL	) CIVIL ACTION NO.
	) CA #3-97-CV-1452-G
Plaintiffs,	)
vs.	)
	) ENTERED ON DOCKET
UNITED STATES OF AMERICA,	) 2-19-98 PURSUANT TO
et al.	) F.R.C.P Rules 58 and 79a
Defendants.	)

MEMORANDUM ORDER

Before the court are the motions of (1) the defendants Lewis Giles, Kathy Gowens, Nancy S. Spotser, Emmet J. Schayot, Bobby E. Scott (collectively "individual defendants"),[1] and the United States (collectively, "defendants") to dismiss, or alternatively for summary judgment, and (2) the plaintiffs Oliver Neal Paulson and Sandra Neon Paulson (collectively, "plaintiffs") for summary judgment. For the reasons set forth below, the defendants' motion is granted, and the plaintiffs' motion is denied.

I. BACKGROUND

On June 17, 1997, the plaintiffs filed this action for relief under 42 U.S.C. sections 1983, 1985, and 1986, alleging that the defendants did not follow proper procedures in seizing and selling their real property ("Property") to satisfy their tax liability. Demandants' Original Verified Common Law Complaint ("Original Complaint"); Demandants' Amended Common Law Complaint ("Complaint"); Memorandum in Support of IRS Defendants' Motion to Dismiss or for Summary Judgment ("Defendant's Brief") at 2. On October 7, 1997, the defendants filed their motion to dismiss, or alternatively for summary judgment, and on January 12, 1998, the plaintiffs filed their motion for summary judgment. IRS Defendants' and United

[1] The individual defendants are employees of the Internal Revenue Service. See Motion at 1-2; Declaration of Lewis Giles at 1, attached to Motion: Declaration of Nancy S. Spotser at 1, attached to Motion; Declaration of Emmet J. Schayot at 1, attached to motion.

States' Motion to Dismiss and for Summary Judgment ("Motion"); Request for Hearing on Respondent United States Motion to Dismiss and Demandants' Request for Summary Judgment, with Incorporated Memorandum and Orders under Rule 56, Fed.R.Civ.P.; and 28 U.S.C. 2410(a).

II. ANALYSIS

A. United States

The United States argues that, under the doctrine of sovereign immunity, it is immune from the plaintiffs' claims. Defendants' Brief at 3-7. "[S]overeign immunity shields the Federal Government and its agencies from suit." Federal Deposit Insurance Corporation v. Meyer, 510 U.S. 471, 475 (1994). Only Congress can waive the sovereign immunity of the United States. See United States v. Shaw, 309 U.S. 495, 502 (1940); Moore v. United States Department of Agriculture on Behalf of Farmers Home Administration, 55 F.3d 991, 994 (5th Cir. 1995); Drake v. Panama Canal Commission, 907 F.2d 532, 534 (5th Cir. 1990). Further, any "waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. King, 395 U.S. 1, 4 (1969).

"Sovereign immunity is jurisdictional in nature." Meyer, 510 U.S. at 475. The party who urges jurisdiction upon the court must bear the burden of demonstrating subject matter jurisdiction. Shirley v. Maxicare Texas, Inc., 921 F.2d 565, 567 (5th Cir. 1991). The plaintiffs therefore bear the burden of demonstrating proper jurisdiction and must show that Congress has waived the United States' sovereign immunity.

The plaintiffs do not allege how Congress has waived the United States' immunity with respect to their claims.[1] Because

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[1] It appears that the plaintiffs may intend to argue that 28 U.S.C. section 2410(a)(1) waives the United States' immunity. See Complaint para. 5. The plaintiffs aver that this court has "authority" under 28 U.S.C. section 2410(a)(1). Id. para. 5. Section 2410(a)(1) provides for waiver of sovereign immunity in cases where a plaintiff seeks to quiet title to real property in which the United States has or claims a mortgage or other lien. 28 U.S.C. section 2410(a)(1): *Montgomery v. United States*, 933 F.2d 348, 349 (5th Cir. 1991); *McCarty v. United States*, 929 F.2d 1085, 1087 (5th Cir. 1991). However, application of section 2410(a)(1) requires the plaintiff to file suit before the United States sells or otherwise transfers the property in dispute. Hughes v. United States, 953 F.2d 531, 538 (9th Cir. 1992); *McDonald v. United States*, 1995 WL 355294 at *1 (E.D. Tex. 1994). Because the United States deeded

the plaintiffs have not satisfied their burden of demonstrating that this court has jurisdiction over their claims against the United States, their claims are dismissed.

B. Individual Defendants

1. *Service of Process*

The individual defendants assert that they were not properly served. Defendants' Brief at 2-3. However, the plaintiffs complied with the rules regarding service on officers of the United States. Pursuant to Fed.R.Civ.P.4(i) (2),[1] the plaintiffs sent a copy of the summons and complaint by certified mail to each of the individual defendants. See Giles Return Receipt: Gowens Return Receipt; Spotser Return Receipt; Schayot Return Receipt; Scott Return Receipt. In addition, as rquired by Rule 4(i)(2) and Fed. R.Civ.P.4(i)(1),[2] the plaintiffs served the United States by delivering a copy of the summons and complaint to the local United States attorney and sending a copy of the summons and complaint by certified mail to the Attorney General of the United States. See United States Attorney Returns of Service; United States Attorney General Return Receipts. Accordingly, the plaintiffs properly served the individual defendants.

2. Failure to State Claim

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the Property to Bobby H. Anglin on August 2, 1995, Complaint para. 35(B), and the plaintiffs did not file this action until June 17, 1997, Original Complaint, section 2410(a)(1) is not applicable.

[1] Rule (4)(i)(2) provides:
Service upon an officer, agency, or corporation of the United States, shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, agency, or corporation.

[2] Rule 4(i)(1) provides; Service upon the United States shall be effected (A) by delivering a copy of the summons and complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail to the civil process clerk at the office of the United States attorney and,
(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia. ...

The individual defendants argue that the plaintiffs have failed to state a cause of action against them. Defendants' Brief at 7-9. Fed.R.Civ.P. 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." A motion under Rule 12(b)(6) should be granted only if it appears beyond doubt that the plaintiffs could prove no set of facts in support of their claims that would entitle them to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Leffall v. Dallas Independent School District, 28 F.3d 521, 524 (5th Cir. 1994) (citations omitted).

The Motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982) (quoting CHARLES A. WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURES section 12357), cert. denied, 459 U.S. 1105 (1983). Granting such a motion "is a 'precarious disposition with a high mortality rate.'" Id. (quoting Barber v. Motor Vessel "Blue Cat," 377 F.2d 626, 627 (5th Cir. 1967).

In determining whether dismissal should be granted, the court must accept all well-pleaded facts as true and view them in light most favorable to the plaintiffs. Capital Parks, Inc. v. Southeastern Advertising and Sales System, Inc., 30 F.3d 627, 629 (5th Cir. 1994) (citation omitted); Norman v. Apache Corporation, 19 F.3d 1017, 1021 (5th Cir. 1994) (citations omitted); Chrissy F. by Medley v. Mississippi Department of Public Welfare, 925 F.2d 844, 846 (5th Cir. 1991.

a. Section 1983 Claim

To state a valid claim under section 1983, the plaintiffs must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988); (citing Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled in part on other grounds by Daniel v. Williams, 474 U.S. 327, 330-31 (1986), and Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978)). The plaintiffs section 1983 claim fails on the second element. "[F]ederal officials, acting under color of federal law rather than state law, are not subject to suit under section 1983." Resident Council of Allen Parkway Village v. United States Department of Housing & Urban Development, 980 F.2d 1043, 1053 (5th Cir.), cert. denied, 510 U.S. 820 (1993). Because the individual

defendants acted under color of federal law in seizing and selling the Property, the plaintiffs have not stated a viable claim under section 1983.[1] See Id.; Boyd v. United States, 861 F.2d 106, 107-08 (5th Cir. 1988).

b. *Section 1985 Claim*

Although the plaintiffs pled a 42 U.S.C. section 1985 conspiracy claim, they make only bald allegations of a conspiracy, and therefore the claim is properly dismissed. See Young v. Biggers, 938 F.2d 565, 569 (5th Cir. 1991); Lynch v. Cannatella, 810 F.2d 1363, 1367-1269); Burnett v. Short, 441 F.2d 405, 406 (5th Cir. 1971).

c. Section 1986 Claim

"To maintain a cause of action under section 1986 the plaintiff must have a valid cause of action under section 1985." Wells v. City of Carrollton, Texas, 678 F.Supp. 632, 635 (N.D. Tex. 1988) (citing Brandt v. Smith, 634 F.2d 796, 801-02 (5th Cir.), cert. denied, 454 U.S. 830 (1981)). Because the court has concluded that the plaintiffs have failed to state a valid claim under section 1985, it necessarily follows that they have failed to state a valid claim under section 1986.

III. CONCLUSION

For the reasons set forth above, the motion of defendants to dismiss the plaintiffs' claims is GRANTED.[2]
SO ORDERED

February 19, 1998.

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[1] Although the plaintiffs have not pled a Bivens claim against the individual defendants, it appears that they may intend to do so. See Complaint para. 5; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotis*, 403 U.S. 388 (1971). The plaintiffs allege that this court has "authority" under the 4th, 5th, 7th, and 14th Amendments. Id. Nonetheless, absent an allegation that a tax official deliberately and improperly harassed the taxpayer during the tax collection process, a Bivens action against the official is not available. *Baddour, Inc. v. United States*, 802 F.2d 801, 806-09 (5th Cir. 1986). Because the plaintiffs do not allege that the individual defendants deliberately and improperly harassed them, they have not stated an actionable Bivens claim.

[2] Plaintiffs' motion for summary judgment is DENIED.

/S/A. Joe Fish
A. JOE FISH
United States District Judge

Certified a true copy of an instrument on file in my office on 4/27/98 NANCY DOHERTY, Clerk, U.S. District Court, Northern District of Texas By Carla Johnson, DEPUTY

Stamp Filed FEB 19, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLIVER NEAL PAULSON, ET AL	) CIVIL ACTION NO.
	) CA #3-97-CV-1452-G
Plaintiffs,	)
vs.	)
	) ENTERED ON DOCKET
UNITED STATES OF AMERICA,	) 2-19-98 PURSUANT TO
et al.	) F.R.C.P Rules 58 and 79a
Defendants.	)

JUDGMENT

This judgment is entered pursuant to F.R.Civ.P. 58 and the memorandum order of this date. For the reasons stated in that memorandum order, it is ORDERED that the plaintiffs take nothing from the defendants on their claims in this case and that the defendants recover their costs of court.
February 19, 1998.

/S/ A. Joe Fish
A. JOE FISH
United States District Judge

Certified a true copy of an instrument on file in my office on 4/27/98 NANCY DOHERTY, Clerk, U.S. District Court, Northern District of Texas By Carla Johnson, DEPUTY

Stamp Filed FEB 19, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
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OLIVER NEAL PAULSON, ET AL	) CIVIL ACTION NO.
	) CA #3-97-CV-1452-G
Plaintiffs,	)
vs.	)
	) ENTERED ON DOCKET
UNITED STATES OF AMERICA,	) 3-6-98 PURSUANT TO
et al.	) F.R.C.P Rules 58 and 79a
Defendants.	)

ORDER

Plaintiffs' request for reconsideration is DENIED.

SO ORDERED.

March 5, 1998.

/S/ A Joe Fish
A. JOE FISH
United States District Judge

Stamp filed March 5, 1998 by Nancy Doherty, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
U.S.COURT OF APPEALS

No. 98-10407

Conference Calendar
Charles R. Fulbruge III
Clerk

OLIVER NEAL PAULSON; SANDRA NEON PAULSON,
Plaintiffs-Appellants,

versus,

LEWIS GILES; KATHY GOWENS; NANCY S. SPOTSER;
UNITED STATES OF AMERICA; EMMET J. SCHAYOT;
BOBBY E. SCOTT,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas USDC No. 3:97-CV-1452-G

Before DAVIS, DeMOSS, and STEWART, Circuit Judges.
PER CURIAM:*

Oliver Neal Paulson and Sandra Neon Paulson appeal the district court's dismissal of the United States from this suit on sovereign immunity grounds. They maintain that the seizure and sale of their real property by the Internal Revenue Service (IRS) pursuant to a tax lien were invalid because the IRS did not give proper notice under 26 U.S.C. section 6335 (a) and (b). They argue that because the sale to a third party was thus made invalid, the United States still has a lien on the property and sovereign immunity has been waived under 28 U.S.C. section 2410(a).

In Koehler v. United States, 153 F.3d 263 (5th Cir. 1998), this court held that the same procedural error committed by the IRS would not serve to negate the sale and recreate a lien on the property on behalf of the United States. "At its core, sovereign immunity deprives the courts of jurisdiction irrespective of the

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. 47.5.4.

merits of the underlying claim. If the specific terms of the statute are not met, the federal courts have no jurisdiction to address the merits of the plaintiff's claim." Id. at 267. "In the end, because the plain and unambiguous terms of section 2410(a) have not been met --- i.e., the government no longer claims an interest in the property—section 2410(a) does not confer subject matter jurisdiction irrespective of how meritorious taxpayer's claims may be." Id.

For the same reasons, the district court's dismissal of the United States on sovereign - immunity grounds is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
U.S.COURT OF APPEALS
No. 98-10407

OLIVER NEAL PAULSON; SANDRA NEON PAULSON,
Plaintiffs-Appellants,

versus,

LEWIS GILES; KATHY GOWENS; NANCY S. SPOTSER
UNITED STATES OF AMERICA; EMMET J. SCHAYOT;
BOBBY E. SCOTT,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:97-CV-1452-G

ON PETITION FOR REHEARING

Before DAVIS, DeMOSS, and STEWART, Circuit Judges.

IT IS ORDERED that the petition for rehearing is DENIED.

FOR THE COURT:
/S/ Harold R. DeMoss, Jr.
HAROLD R. DeMOSS, JR.
UNITED STATES CIRCUIT JUDGE

CLERK'S NOTE
SEE FRAP AND LOCAL
RULES 41 STAY OF THE
MANDATE

Conference Calendar
FILED Mar. 1 1999,
Charles R. Fulbruge III
Clerk

United States v. Nordic Village, Inc., 503 U.S. 30, (1992).

Purpose of reference: This case presents a narrow question: Does section 106 of the Bankruptcy Code waive sovereign immunity of the United States from an action seeking monetary recovery in bankruptcy?

Opinions of the Court. Waivers of the Government's sovereign immunity to be effective, must be "unequivocally expressed." Legislative history has no bearing on this point, for the 'unequivocal expression" of waiver must be an expression in statutory text.

"...Despite its ancient lineage, the doctrine of sovereign immunity is nothing but a judge-made rule that is sometimes favored and sometimes disfavored. "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

Court should not be "a self-constituted guardian of the Treasury [and] import immunity back into a statute designed to limit it". Court should not thwart the "broad statutory language authorizing suit" against the United States with "an unduly restrictive interpretation".

... Justice Stevens and Blackmun state on page 45-46, "...The Court's stubborn insistence on "clear statements" burdens the Congress with unnecessary reenactment of provisions that were already plain enough when read literally. The cost to litigants, to the legislature, and to the public at large of this sort **of judicial lawmaking** is substantial and unfortunate. Its impact on individual citizens engaged in litigation against the sovereign is tragic.

The fact that Congress has ample power to correct the Court's unfortunate error does not justify this refusal to obey its command. ... The case further illustrates that when the Federal Government enters into business transactions, it should be prepared to deal upon a basis of equality with other creditors of the bankrupt business. (cites omitted.)

Office of the Attorney General

State of Texas

Dan Morales
ATTORNEY GENERAL

December 29, 1995

The Honorable John Vance
Dallas County District Attorney
411 Elm Street
Dallas, Texas 75202

Letter Opinion No. 95-091
Re: Filing of federal tax liens and related questions (RQ-812)

Dear Mr. Vance:

You ask four questions about the filing of federal tax liens. Your fist question is: "Is filing 'notice' of a federal tax lien by the IRS sufficient to perfect the lien or does an 'actual lien' itself have to be filed?"

Section 6321 of the federal Internal Revenue Code (the "code"), title 26 of the United States Code, provides that if a person liable to pay nay tax fails or refuses to pay, the amount together with interest, penalties, costs, etc. "shall be a lien in favor of the United States upon all property and rights to propety, whether real or person belonging to such person." Section 6323(a) provides that '[t]he lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgement lien creditor until *notice* thereof which meets the requirements of subsection (f) has been filed by the Secretary."[1] (Emphasis added.) See also 26 U.S.C. § 6323(f) (where "notice" is filed depends on state recordation laws), (h)(5) ("[T]he term 'tax lien filing' means the filing of notice (referred to in subsection (a) of the lien imposed by section 6321.")[2] We assume, from the discussion in the brief you submitted with your request, that by the word "perfect" in your question, you mean to make "valid as against "purchasers and other persons described in section 6323(a) quoted above. Section 6323, in our opinion,

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[1] Section 7701(11) provides that "Secretary" as used in the code means "the Secretary of the Treasury or his delegate." See discussion infra (response to second question.)

[2] *See also, e.g.* Prop. Code § 14.002(a) ("Notices of liens ... must be filed in accordance with this chapter.") Chapter 14 of the State Property Code deals specifically with registration of federal liens.

makes it clear that it is the filing of "notice" of the federal tax lien in the proper office which makes the lien "valid as against" such persons.[1]

Your second question is: "Does a federal tax lien, or notice of lien, have to be certified to be filed?" Chapter 14 of the Property Code deals specifically with federal lien registration. Section 14.003, cited in your brief, provides the answer to your question. Section 14.003 reads in part: "Certification of notices of liens ... by the secretary of the treasury of the United States or his delegate ... entitles them to be filed *and no other attestation, certification, or acknowledgment is necessary.*"[2] (Emphasis added) See also 26 U.S.C. §§ 6323(a) lien not valid until notice "has been filed by the Secretary"), 7701(11) ("Secretary" as used in code means "the Secretary of the Treasury or his delegate"), (12) ("[d]elegate" means officer, employee, or agency of Treasury Department authorized to perform function in question).

Your third question is: "Where is the notice of lien to be recorded and how is it ... indexed?" Section 6323(f)(1)(A)(i) of the Internal Revenue Code provides that notices of liens against real property are to be filed "in one office within the State (or the county, or other governmental subdivision) as designated by the laws of such State, in which the property subject to the lien is situated." Property Code section 14.002 provides that notices of liens on real property are to be filed in the office of the county clerk of the county where the property is located. Regarding liens against personal property, subsection (f)(1)(A)(ii) of section 6323 provides in relevant part that notices of such liens are to be filed in the office designated by state law of the governmental subdivision in which the property subject to the lien is situated. Subsection (f)(2)(B) provides that the situs of real property shall be deemed to be at the residence of the taxpayer at the time the

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[1] But see infra note 5 (additional federal provisions to effect that filing requirements are not met unless lien instruments are indexed in such manner that reasonable inspection will disclose their existence).

[2] Compare the general provisions in Property Code section 12.001 (instrument concerning real or personal property may be recorded if acknowledged, sworn to or proved according to law; instrument concerning real property may not be recorded unless signed, acknowledged, or sworn to before witnesses, or acknowledged or sworn to before and certified by officer authorized to take acknowledgements or oaths).

lien is filed. Property Code section 14.002 provides that notices of federal liens on personal property shall be filed in the office of the county clerk in the county where the person against whose interest the lien applies resides at the time it is filed, except that for corporations and partnerships, as such are defined in the internal revenue laws, the notice shall be filed in the office of the Texas Secretary of State. Since federal tax liens apply to all property of the taxpayer, *see id.* § 6321, the notices should be filed in both locations, where the locations for filing liens against personal and real property are different.

As to indexing notices of federal tax liens when they are filed, chapter 14, Property Code, provides that if the filing officer is the secretary of state, he or she shall "cause the notice to be marked, held, or placed on microtext and indexed in accordance with provisions of Section 9.403(d) of the Uniform Commercial Code as if the notice were a financing statement within the meaning of that code." Prop. Code § 14.004(a)(1). Any other filing officer must endorse on the notice his identification and the date and time of receipt and file it in the real property records and on request of the filing party in the personal files "or enter it in an alphabetical index for real or personal property, as appropriate," showing the name and address of the person named in the notice, the date and time of receipt, the title an address of the certifying official or entity, and the amount appearing on the notice. *Id.* § 14.004(a)(2). *See also* Local Gov't Code §§ 193.003 (county clerk to maintain alphabetical index to instruments relating to real property), .005 (county clerk to maintain alphabetical index of instruments relating to personal property), .008 (for microfilm records, county clerk may divide instruments into seven classes, including "Official Public Records of Real Property" and "Official Public Records of Personal Property and Chattels," or may consolidate the seven classes into single class, "official Public Records"), .009 (instruments recorded on microfilm must be alphabetically indexed and cross indexed to official public record under names of parties in instrument; index entries for real and personal property instruments must show names of parties, description of nature of nature of instrument, date of filing, description of property, and location of microfilm image of instrument), 204.006 (index to microfilm record must show same information as required for record not on microfilm).[1]

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[1] Federal law, 26 U.S.C. § 6323(f)(4), essentially provides that filing requirements are not met unless the notices are recorded and indexed in such a manner that a reasonable inspection will disclose the lien's existence if, under

Finally, you ask: "How may a notice of lien be released or revoked?" You indicate that this question is prompted by a taxpayer against whom a notice of lien had been filed having submitted for filing his own document, styled "notice of Revocation for Notice of Federal Tax Lien," and asked that the federal lien be removed. Section 6325 of the Internal Revenue Code provides for the "Secretary" filing a release of lien. As indicated above, "Secretary" as used in the code means the Secretary of the Treasury or his or her delegate. We find no provision permitting the person against whom a lien has been filed to release the lien.

SUMMARY

Filing of "notice" of a federal tax lien in the proper office by the United States Secretary of the Treasury of his or her delegate makes the lien valid against purchasers and other persons described in Internal Revenue Code section 6323. Certification of a notice of lien by the Secretary of the Treasury of his or her delegate entitles it to be filed and no other attestation, certification, or acknowledgment is necessary. Notices of federal tax liens other than ones against corporations and partnerships are to be filed against real property in the office of the county clerk of the county where real property of the person against whose interest the lien applies is situated. Notices of such liens against personal property are to be filed in the office of the county clerk of the county where the person against whose interest the lien applies resides at the time it is filed. The United States Secretary of the Treasury or his or her delegate may file a release of a federal tax lien. There is no provision for the

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the law of the state where the real property is located, a deed is not valid against a subsequent purchaser without actual notice unless recorded and indexed in such manner *and* there is maintained "an adequate system for the public indexing of Federal tax liens" at the filing office. Property Code section 13.001 makes unrecorded conveyances of real property or interests therein void against sub-sequent purchasers without actual notice if they paid a valuable consideration (but binding on purchasers who did not pay valuable consideration or who had actual notice). Chapter 14 of the Property Code in conjunction with the other provisions discussed above does, we think, at least provide for an "adequate system" for indexing federal tax lines. Whether an adequate system is in fact "maintained" at a particular filing office is, of course, a fact question.

release of a lien by the person against whom a lien has been filed.

Yours very truly,

/S/ William Walker
Assistant Attorney General
Opinion Committee